Dr. Gilbert did not address how the results of the 1993 MRI impaired Orndorf from performing his occupation now, when he was able to do so for two years after that test from 1993 to 1995. While Dr. Gilbert claimed Orndorf had "progressive incapacitating back pain," he failed to address that the medical records reveal not only intermittent complaints and treatment for back pain, but also that Orndorf had been physically active. *Id.* Notably, Dr. Gilbert's letter only recounts what Orndorf "says" about his physical limitations.

Paul Revere, after having its medical consultant review the medical information submitted on appeal, including Dr. Gilbert's letter, concluded neither Orndorf's back pain, neck pain, ankle pain, nor hypertension made him totally disabled. (A-14, 15). Agreeing with Paul Revere's decision, the district court found Orndorf's disability claim due to physical limitations "collapses under the weight of the Record." (A-95). Likewise, the First Circuit found that Orndorf simply did not meet his burden of proving he was totally disabled due to a physical limitation. (A-38).

While Orndorf now claims review is necessary because he was not permitted to take discovery or supplement the record with additional evidence, he fails to inform this Court he was given repeated opportunities by the district court to show cause why discovery and supplementation of the record was appropriate. On two occasions (an August 6, 2002 Order and at the October 24, 2002 Rule 16 Conference) the district court ordered Orndorf to identify the items with which he sought to supplement the record and show good cause for any discovery requested. (A-24). In response, Orndorf did not ask for leave to take discovery. Instead, Orndorf simply stated he wanted to file some "medical records concerning his continuing disability, expert medical evidence concerning his disability and vocational expert evidence concerning the

important duties of his occupation as a perfusionist." Motion of Jacob M. Orndorf to Submit Additional Evidence, Civ. Ac. No. 02-30024-FHF (Nov. 15, 2002). Finding that despite repeated instructions Orndorf failed to "list specifically and to show good cause for each item of evidence [he] would like added to the Record," only "vaguely requests to supplement the Record with 'vocational evidence' and 'medical evidence of a continuing disability'" and "generally fails to specify what form this evidence will take or its necessity to the Court's review," the district court denied Orndorf's request to supplement the record, but for a vocational report that would provide more information regarding the occupational duties of a perfusionist. (A-71, 72).

Having determined that it had a complete administrative record for review, the district court held that the case could be resolved on cross motions for summary judgment and scheduled deadlines for briefing. Rather than file his motion for summary judgment as directed by the Court, Orndorf filed a motion where he sought leave to supplement the administrative record with various medical records and a medical examination, all of which were generated after Paul Revere's final decision. Orndorf also sought leave to conduct discovery on whether:

> Paul Revere fulfilled its fiduciary role in obtaining the necessary information in order to make a proper determination, whether the medical doctors and other staff who assisted in compiling the record followed proper procedure, whether the medical doctors and other staff were properly educated and trained to do so and whether they are qualified to render an expert opinion via the record and at trial.

Motions of Jacob M. Orndorf for Reconsideration of the Order of December 30, 2002 and for Leave to Submit Additional Evidence for Discovery and to Postpone the Filing of Cross Motion for Summary Judgment, ¶13, Civ. Ac. No. 02-30024-FHF (Jan. 28, 2003).

Orndorf never asked for discovery of whether Paul Revere denied his claim for reasons beyond those set forth in the administrative record. The district court denied Orndorf's motion, and subsequently found in Paul Revere's favor after considering cross motions for summary judgment.

REASONS FOR DENYING PETITION

I. THE FIRST CIRCUIT'S DECISION IN *ORNDORF* DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FIRESTONE*.

Orndorf argues that the First Circuit's decision is in "direct conflict with the decision of this Court in *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 115 (1989)," because "the distinction between de novo review and differential review established in *Firestone* has disappeared." *See* Pet. for Cert. at 4-5. This argument is an attempt to create an issue where none exists.

In *Firestone*, this Court established that a denial of benefits under 29 U.S.C. §1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan grants discretion to the plan administrator. *Firestone*, 489 U.S. at 115. A deferential standard of review is appropriate when the plan grants a plan fiduciary discretion to interpret the terms of the plan and render a benefit decision. *Id.* It is undisputed no such language exists in Orndorf's Policy. Therefore, both

the district court and the First Circuit subjected Paul Revere's decision to de novo review.

The First Circuit clearly distinguishes between de novo review and arbitrary and capricious review. Under arbitrary and capricious review, the Court gives deference to the plan administrator and merely asks whether the decision was reasonable. *Id.* at 111. However, as articulated by Orndorf and correctly applied by the district court and the First Circuit, under de novo review the correct standard is "whether upon a full review of the administrative record, the decision of the administrator was correct." (A-19). The First Circuit recognized that,

> de novo review generally consists of the court's independent weighing of the facts and opinions in [the] record to determine whether the claimant has met his burden of showing he is disabled within the meaning of the policy. [T]he court grants no deference to administrators' opinions or conclusions based on facts.

(A-20). Applying this correct standard of review, the district court concluded that Orndorf's disability claim due to physical limitations "collapses under the weight of the Record." (A-95). Likewise, the First Circuit undertook another thorough review of the extensive record and concluded that "Orndorf does not meet the definition of disability by a physical condition." (A-38). The First Circuit recognized the difference between de novo and deferential review, and correctly applied the de novo standard. There is no conflict between the First Circuit's decision and this Court's ruling in *Firestone*.

II. THE FIRST CIRCUIT'S APPROACH TO ERISA DECISIONS SUBJECT TO DE NOVO REVIEW IS WIDELY FOLLOWED AMONG THE CIRCUITS.

A. The Methods Employed Among The Circuit Courts of Appeal For Resolving ERISA Decisions Under De Novo Review Are Remarkably Similar.

Orndorf argues there is "confusion in the lower courts" regarding the meaning of de novo review under *Firestone*. *See* Pet. for Cert. at 7. To the contrary, the methods employed among the Circuit Courts of Appeal for adjudicating ERISA benefit determinations under de novo review are remarkably similar.

Procedurally in *Orndorf*, the parties called their moving papers cross motions for summary judgment. However, as the First Circuit points out, "in an ERISA case where review is based only on the administrative record before the plan administrator and is an ultimate conclusion as to disability to be drawn from the facts, *summary judgment is simply the vehicle for deciding the issue*." (A-16) (emphasis added). "This means the non-moving party is not entitled to the usual inferences in its favor." (A-17).

As the First Circuit makes clear, and Orndorf seems to ignore, this was not a case where additional evidence or discovery was necessary to complete the record. As such, the First Circuit did not extend its opinion to the proper method for adjudicating ERISA decisions under those circumstances. The First Circuit held that "where review is properly confined to the administrative record," summary judgment is the proper "vehicle for deciding the issue." (A-16).

This is precisely the method employed among the Circuit Courts of Appeal under de novo review. In the Second Circuit, this method of adjudication is called a "motion for judgment on the administrative record" or "bench trial on the papers." *Muller v. First Unum Life Ins. Co.*, 341 F.3d 119, 124 (2d. Cir. 2003). The Third Circuit calls it "a de novo review of the record." *Luby v. Teamsters Health Welfare & Pen. Tr.*, 944 F.2d 1176, 1185 (3d. Cir. 1991). In the Sixth Circuit it is a "motion for entry of judgment." *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 619 (6th Cir. 1998). Regardless of the name, the method is the same. The district court sits as the fact finder, reviewing the record and making its own independent benefit determination. *See Keszenheimer v. Reliance Standard Life Ins. Co.*, 402 F.3d 504, 511 (5th Cir. 2005) (reversing summary judgment for claimant and entering summary judgment for insurer); *Williams v. Bell S. Telecomm.*, 373 F.3d 1132, 1134, 1139 (11th Cir. 2004) (affirming grant of summary judgment and holding that while application of arbitrary and capricious was incorrect, even under de novo review there was more than sufficient medical evidence to contradict the plaintiff's claim that she was disabled as defined by the policy); *Gallager v. Reliance Standard Life Ins. Co.*, 305 F.3d 264, 270 (4th Cir. 2002) (entering summary judgment in favor of the insurer, the court held that its job under de novo review was to determine whether the proof of total disability submitted was objectively satisfactory); *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1094 (9th Cir. 1999) (determining whether the plaintiff is disabled within the terms of the policy by means of a bench trial on the record).

Thus, the First Circuit's determination that summary judgment is the proper vehicle for resolving an ERISA benefits case where de novo review applies, there is a complete record and there is no dispute over plan terms is not

appreciably different than the methods used by the Second, Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits. There is no "confusion" and there is no conflict that would warrant the Court's review of this issue.

Orndorf cites four cases in support of his contention that a conflict exists among the Circuit Courts of Appeal as to how ERISA cases should be adjudicated under de novo review. All four cases are easily distinguished. Orndorf cites *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 332 (7th Cir. 2000), claiming that the Seventh Circuit requires a more plenary review than the First Circuit gives in de novo cases. However, *Herzberger* does nothing of the sort. *Herzberger* dealt with two district court decisions that granted summary judgment to the insurer using an arbitrary and capricious standard of review. *Id.* at 329. The Seventh Circuit in *Herzberger* found that the language in both plans was insufficient to grant discretionary review. *Id.* As such, the Seventh Circuit remanded the cases back to the district court for review under the de novo standard. *Id.* at 333. This Seventh Circuit decision makes no ruling as to how those cases should be adjudicated under de novo review.

Orndorf also cites *Kearney v. Standard Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999) in support of his claim that there is a split regarding how cases should be adjudicated under de novo review. However, there is no appreciable difference between the trial on the administrative record utilized in the Ninth Circuit and the way the First Circuit has determined it should handle these cases.

Kearney held the summary judgment standard requiring there be no genuine issue of material fact in dispute was inapplicable in that case. *Id.* at 1094. The Ninth Circuit suggests utilization of a bench trial on the record.

"Testimony" in a trial on the record is "in the nature of exhibits, in the nature of documents, which are routinely the basis for findings of fact even though no one reads them aloud." *Id.* at 1094. A full trial de novo on new evidence would undermine the policies behind ERISA and be inconsistent with reviewing the administrator's decision about whether to grant the benefit. *Id.*

> The means that suggests itself for accomplishing trial of disputed facts while preserving the value of the fiduciary review procedure, keeping costs and premiums down, and minimizing diversion of benefit money to litigation expense, is trial on the administrative record, in cases where the trial court does not find it necessary . . . to consider additional evidence.

Id.

Therefore, the Ninth Circuit holds that a trial on the record is merely a review of the administrative record with the district court asking not whether there is a genuine issue of material fact, but whether the claimant is disabled within the meaning of the terms of the policy. *Id.* at 1095. This is exactly the methodology employed by the First Circuit for evaluating ERISA benefit determinations under de novo review.

Ray v. Unum Life Ins. Co. of Am., 314 F.3d 482 (10th Cir. 2002) likewise provides no support for Orndorf's argument that a conflict exists with respect to adjudication of ERISA cases under de novo review. In *Ray* the Tenth Circuit found the district court's use of the arbitrary and capricious standard of review was in error and therefore remanded to the district court to apply the de novo standard of review. *Id.* at

487. Following the holding in *Hall v. Unum Life Ins. Co.*, 300 F.3d 1197 (10th Cir. 2002),[1] the Tenth Circuit found that remand was necessary because under the de novo standard of review the district court could *in its discretion* consider additional evidence that it felt was necessary whereas under the arbitrary and capricious standard of review it could not. *Id.* at 488. *Ray* does not state how the district court should facilitate the adjudication of the de novo review.

Shaw v. Connecticut Gen. Life Ins. Co., 353 F.3d 1276, 1287 (11th Cir. 2003) also does not address how to adjudicate an ERISA benefits decision under de novo review. Orndorf argues that the Eleventh Circuit "expressly held that factual conflicts defeat resolution by summary judgment and warrant remand for a bench trial when the appropriate standard of review is de novo." *See* Pet. for Cert. at 7.

However, in *Shaw* the court did not determine whether the record was complete but rather remanded the case to the district court to allow the parties to present additional evidence. After a thorough review of the record, the Eleventh Circuit concluded the case could not be resolved on summary judgment and remanded it for a bench trial where "[t]he trial judge may then determine whether the plan administrator's decision was 'wrong and unreasonable' with the benefit of a fuller record." *Id.* at 1286. The court did not define what was required for a "full record." However, in a

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[1] In *Hall* the Tenth Circuit held that the best way to implement ERISA's purposes in this context is ordinarily to restrict de novo review to the administrative record, but to allow the district court to supplement the record when circumstances clearly establish that additional evidence is necessary to conduct an adequate de novo review of the benefit decision. *Id.* at 1202.

footnote the court does say de novo review permits the parties to put before the district court additional evidence. *Id.* at n.6.

Shaw does not create a conflict between the Eleventh and First Circuits. When no additional evidence or discovery is needed, the Eleventh Circuit decides the case on the record. For example, in *Williams v. Bell S. Telecom.*, 373 F.3d 1132 (11th Cir. 2004), the Eleventh Circuit affirmed the district court's grant of summary judgment. *Id.* at 1134, 1139. The court held that while the district court's application of the arbitrary and capricious standard of review was incorrect, even under de novo review there was more than sufficient medical evidence to contradict the plaintiff's claim that she was disabled. *Id.* at 1139.

Contrary to Orndorf's assertion, there is no "inchoate unease about the fairness or unfairness of ERISA litigation." *See* Pet. for Cert. at 8. In all of the Circuits that have addressed the issue directly, where the court determines that the administrative record is complete, the proper method of adjudication is a de novo review of the administrator's decision without the need or expense of a full trial on the merits.

When the court determines, in its discretion, that additional evidence or discovery is warranted to complete the record, such a review may not always be plausible. However, that issue was not addressed by the First Circuit and was certainly not the case in *Orndorf*. To accept the position Orndorf advocates and allow an evidentiary hearing or trial on the merits in every ERISA decision subject to de novo review would require the court to start from scratch in every case. This is a complete contradiction of the principles behind ERISA and "the need for prompt and fair claims

settlement procedures." *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

The First Circuit's method for adjudicating ERISA benefit decisions under de novo review does not shift the evidence gathering authority or unfairly delegate "full and fair review authority to a private insurance company with a financial stake in the outcome" as Orndorf claims. *See* Pet. for Cert. at 10. A plan administrator's decision is just one step in the process. Its decision is then reviewed de novo, without any deference by the district court. As the First Circuit clearly stated, de novo review "generally consists of the court's independent weighing of the facts and opinions in that record to determine whether the claimant has met his burden ..." (A-20).

As for evidence gathering, Orndorf was free to submit whatever evidence he wanted during the claims process. He was again given an opportunity to submit evidence in support of his claim during the appeal. Any such submissions would have been before the court for consideration. A claimant like Orndorf does not lose his due process rights just because the court looks at the administrative record in making its determination, when the claimant had at least two opportunities to include all information he wanted considered in the administrative record.

Furthermore, the district court gave Orndorf an additional opportunity to show cause why the record needed to be supplemented or why additional discovery was required and he failed to do so. (A-71-72). When presented with all of these opportunities to include evidence in the administrative record, there is no basis to argue a due process violation.

Finally, that there is conflicting medical evidence does not preclude resolution based solely on the record. As the First Circuit stated, summary judgment is merely the vehicle by which this type of case is decided. (A-16). Neither the district court nor the First Circuit held there were no issues of disputed fact. Courts have the ability to weigh the evidence and make an independent determination of disability. This is precisely what the district court and the First Circuit did. Both courts evaluated the one piece of conflicting medical evidence, a letter from Dr. Gilbert, in conjunction with the rest of the evidence and determined Orndorf did not meet the definition of disability as provided in the Policy.

There is simply no basis for Orndorf to argue that the First Circuit's method of adjudicating ERISA benefit decisions under de novo review is improper or conflicting with decisions of other courts.

B. There Is No Discernable Conflict Between The Circuits As To The Availability Of Discovery Or Supplementing The Administrative Record Under De Novo Review.

There is no real conflict between the Circuit Courts of Appeal regarding the availability of discovery and supplementing the record on de novo review. Any perceived conflict is "more apparent than real." *See Bunting v. Mellen,* 541 U.S. 1019, 1019 (2004) (denying petition for certiorari where the apparent conflict among the Circuit Courts of Appeal was easily distinguished on factual differences). The general rule among the Circuits is that evidence is limited to the administrative record and that discovery is by necessary implication also limited; whether supplemental evidence is admissible and whether discovery will be allowed is a matter that requires each court to consider the unique facts of the

case before it. This is the holding of the First Circuit in the present case, and it is also the holding of the other Circuit Courts of Appeal that have considered the issue.

Specifically, the First Circuit held that good cause must be shown before a court should exercise its discretion to allow discovery or record supplementation of an ERISA case under de novo review. "Whether evidence is admissible turns on the nature of the challenge to the decision; the answer to the question is not likely to turn on whether the standard of judicial review is de novo or arbitrary and capricious." (A-22). The First Circuit does not rule, as Orndorf argues, that the review is always limited to the record or that discovery is never available. To the contrary, the First Circuit recognizes a court's ability to allow these measures, but specifically finds that Orndorf failed to show good cause and therefore no discovery or supplementation was allowed in this case. (A-23-24). This analysis is factually determinative and must be done on a case-by-case basis.

The other Circuit Courts of Appeal that have considered this issue have reached a consensus that de novo review generally is limited to the administrative record and discovery is denied, absent a showing that supplemental evidence is necessary to conduct an adequate de novo review. Orndorf maintains that *Shaw v. Connecticut General Life Ins. Co.*, 353 F.3d 1276 (11th Cir. 2003), *Ray v. Unum Life Ins. Co. of Am.*, 314 F.3d 482 (10th Cir. 2002), and *Kearney v. Standard Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999) hold otherwise, but

he misconstrues the holdings of those cases.[2]

In *Shaw*, the Eleventh Circuit stated in a footnote that de novo review generally permits parties to submit evidence "beyond that which was presented to the administrator at the time the denial was made." *Shaw*, 353 F.3d at 1284 n.6, *citing Moon v. Am. Home Assur. Co.*, 888 F.2d 86, 89 (11th Cir. 1989) (summarily stating that claimant in that case, where de novo review was applied, was entitled to submit supplemental evidence). The holdings in *Shaw* and *Moon* are particular to the facts of those cases, and are not in conflict with the First Circuit's decision.[3] The First Circuit did not hold that the administrative record may never be supplemented by additional evidence. Rather, the First Circuit held that whether supplemental evidence outside the administrative record may be submitted depends upon the nature of the claim, and whether the claimant can establish supplementation is necessary. (A-22) ("[w]hether

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[2] Orndorf also claims the First Circuit's decision is in conflict with *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989) and *Herzberger v. Standard Ins. Co.*, 205 F.3d 327 (7th Cir. 2000). *See* Part I and Part II, B respectively for a discussion of these cases.

[3] Furthermore, to the extent that *Shaw* addressed this issue, it did so in dicta contained in a footnote. *Shaw*, 353 F.3d at 1284 n.6. As to *Moon*, the dispute there involved whether the claimant's decedent was indeed an "officer" of his company and whether he had in fact been traveling on business. *See Moon*, 888 F.2d at 87. As to such extrinsic matters, the First Circuit in the present case recognized that supplemental evidence may be necessary in order for a court to conduct an adequate de novo review. (A-23) ("evidence may be relevant to explain a key item, such as the duties of the claimant's position, if that was omitted from the administrative record").

[supplemental] evidence is admissible turns on the nature of the challenge to the decision").

Similarly, the Tenth Circuit's decision in *Ray* does not conflict with the First Circuit's holding. Orndorf accurately quotes *Ray* as stating de novo review allows "the district court to consider such additional evidence *as in its discretion it finds necessary* for adequate de novo review...." *Ray*, 314 F.3d at 487 (emphasis added). However, this language is a qualifier to the general rule (which Orndorf conveniently omitted from the sentence), which provides that "the best way to implement ERISA's purposes in this context is ordinarily to restrict de novo review to the administrative record...." *Id.* The holding in *Ray* is easily harmonized with the First Circuit's decision, as the First Circuit noted that "[t]here may be times when it is appropriate for courts to hear new evidence" when conducting a de novo review of a plan administrator's decision. (A-23).

Finally, Orndorf contends that the Ninth Circuit's decision in *Kearney* is illustrative of the "confusion" in the lower courts regarding this matter. *See* Pet. for Cert. at 7. However, there is nothing confusing about the *Kearney* decision. *Kearney* holds that review of a plan administrator's decision, on both de novo and discretionary review, generally is limited to the administrative record, but that supplemental evidence is admissible if necessary to conduct an adequate de novo review. *Kearney*, 175 F.3d at 1090. Again, this is in perfect harmony with the decision of the First Circuit, as well as the decisions of other Circuit Courts of Appeal that have considered the issue. *See Krizek v. Cigna Group Ins.*, 345 F.3d 91, 98 (2d Cir. 2003) (court should not exercise its discretion to allow supplemental evidence unless claimant can demonstrate good cause); *Vega v. Nat'l Life Ins. Servs. Inc.*, 188 F.3d 287, 299 (5th Cir. 1999) (when conducting de novo

review, the district court is generally "constrained to the evidence before the plan administrator" with certain exceptions, such as evidence related to interpreting the plan or explaining medical terms and procedures); *Brown v. Seitz Foods*, 140 F.3d 1198, 1200 (8th Cir. 1998) (discouraging admission of supplemental evidence under de novo review in order to "ensure expeditious judicial review of ERISA benefit decisions and to keep district courts from becoming substitute plan administrators," but allowing such supplemental evidence only where necessary for adequate de novo review); *Casey v. Uddenholm*, 32 F.3d 1094, 1098-1099 & n.4 (7th Cir. 1994) (holding the district court has discretion either to review only administrative record or admit additional evidence where necessary for an adequate de novo review of the plan administrator's decision); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025 (4th Cir. 1993) ("The district court should exercise its discretion [to receive additional evidence] only when circumstances clearly establish that additional evidence is necessary to conduct an adequate review of the benefit decision."); *Luby*, 944 F.2d at 1184-85 (holding additional evidence admissible under de novo review, but noting that "[i]f the record on review is sufficiently developed, the district court may, in its discretion, merely conduct a de novo review of the record of the administrator's decision, making its own independent benefit determination"); *Perry v. Simiplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) (holding that, with certain exceptions, "the de novo review required by [*Firestone v.*] *Bruch* is a de novo review of the record before the administrator or fiduciary....").

Likewise, the First Circuit's decision is not contrary to the Federal Rules of Civil Procedure. Orndorf argues that under the Federal Rules of Civil Procedure he has a right to conduct discovery and any limitation of that right is in error under de

novo review. *See* Pet. for Cert. at 9. However, Orndorf fails to point out that the district court gave him an opportunity to show what discovery he needed and why. (A-71). At first he indicated that he did not want discovery. Later he requested discovery that was completely apparent from the record. The district court evaluated Orndorf's requests and concluded that he failed to show good cause. *Id.* Contrary to Orndorf's assertion, he had every opportunity to show why discovery was necessary and he failed to do so. He cannot now claim any error in the district court's decision not to allow discovery.

Moreover, the district court did allow Orndorf to supplement the record with an additional document showing an occupational description, but refused to supplement the record with medical records that could have been submitted to Paul Revere but were not, or medical evidence created after the claim was closed. (A-71-72). Specifically, the district court evaluated the evidence Orndorf wished to add and determined what evidence it felt was necessary to complete the record. *Id.*

In upholding the district court's decision, the First Circuit held that to allow the evidence Orndorf proposed to supplement the record would have been in error and would "offend interests of finality and exhaustion of administrative procedures required by ERISA" because Orndorf had ample opportunity to present evidence to the administrator during his claim, as well as his two appellate reviews. (A-21). Orndorf cannot argue he was denied any right to supplement where the court reviewed the evidence he wished to add and made an independent determination based on the facts of this case as to what was needed to complete the record.

III. THERE IS NO REASON TO CONSIDER A SETTLEMENT AGREEMENT INVOLVING PAUL REVERE AS A BASIS FOR GRANTING CERTIORARI.

This Court should not consider a settlement agreement involving Paul Revere created long after the final administrative decision. This settlement agreement is mentioned by Orndorf, and included in his Appendix (A-39-69), as evidence that he should have been permitted to conduct discovery and as the basis for granting certiorari. As he states, "[i]t turns out that during the course of Orndorf's litigation the U.S. Department of Labor...[was] conducting an extensive investigation of UnumProvident's claims practices." *See* Pet. for Cert. at 11. This settlement agreement is not a sufficient reason for this Court to review this case.

Orndorf waived this argument by his failure to raise it in the lower court. It is well-established that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 (1970), *citing Lawn v. United States*, 355 U.S. 339, 362-366, n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Accord *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here.").

Orndorf cannot seek Supreme Court review, and eventual discovery in an already decided case, based on what "turns out" to have happened. To allow such a result would wreak havoc on finality in litigation, as well as ERISA's goal of expeditious judicial review of benefit decisions.

The fact that an investigation was conducted by administrative agencies and a settlement agreement reached is simply not relevant to Orndorf's claim he was wrongfully denied benefits. The district court and the First Circuit both conducted a full and fair de novo review of Paul Revere's decision to deny Orndorf disability benefits. The existence of a subsequent settlement agreement has no effect on the scope of review to which Orndorf was entitled at the district court, and which he in fact received.

Finally, it is noted that the district court gave Orndorf the opportunity to conduct discovery. He initially declined to conduct discovery. Later, Orndorf asked for discovery on issues apparent in the administrative record and not designed at all to uncover the information he now claims discovery would have provided access. The district court determined that Orndorf failed to establish with any specificity why he required discovery. (A-71) (First Circuit noting that "[t]he district court invited Orndorf to make a more specific showing of the pertinence of the request, but he did not"); (A-24) (district court denied Orndorf's request for discovery and to supplement record because "in his vagueness he has failed to make the required showing of 'good cause'"). Orndorf cannot now complain that he should have been granted discovery despite his failure to articulate good reason for that discovery, by pointing to a later occurring event that has no relevance to the district court's de novo review of his benefits decision.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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